STATEMENT OF BRENT SCOWCROFT
ON H.R. 3822

I have been asked to comment on H.R. 3822, dealing with Congressional oversight of intelligence activities. I am happy to do so. You have already received copious comments on every aspect of the bill, so I will be brief and to the point.

The principal thrust of this bill, to tighten the requirements for notification of covert action, is an understandable reaction to Congressional frustrations arising from the Iran-Contra affair. But while the reaction is understandable, I do not believe it is wise.

The whole subject of intelligence activities is a particularly difficult part of the generally troublesome issue of executive-legislative cooperation on the formulation and conduct of U.S. foreign policy. The conflict between the need for consultation and the requirement for secrecy to ensure an effective intelligence system is not easily reconciled. The problem becomes especially acute over the matter of covert action.

Covert action, in my opinion, is a valuable instrument of foreign policy, one which it is important for the country to have available for certain highly selective situations and circumstances. But I want to underscore that covert action is a tool of policy. It should not--it must not--become the policy itself. That said, it is important to recognize that, as an instrument, covert action can be useful only to the degree that it remains secret. The Executive Branch deals with the extraordinary requirements for secrecy in handling covert actions through the device of "need to know." In its simplest terms, that phrase means that no one is entitled, solely by virtue of his position, to be informed on any particular intelligence activity. With respect to the Intelligence Committees of the Congress, the device of "need to know" is not so easily administered.

The Constitutional scholar Edwin Corwin has said that in the area of foreign policy, the Constitution is an invitation to struggle between the Executive and the Congress. But however the respective roles may be defined at any particular historical period, it is generally conceded at present by the Executive Branch that the Congress has a role to play with respect to the formulation of foreign policy and to oversight of the execution of those policies, including the employment of covert actions. The question with respect to application of the "need to know" principle in these circumstances is what

precisely does the Congress need to know and when, in order to be able to exercise its responsibilities. The proposed bill, in my judgment, takes a rigid view of those needs, with insufficient regard to the principle of "need to know" and the requirement for secrecy.

While there are several troubling elements in H.R. 3822, my principal concern is the requirement in Section 503 which mandates notification of covert action "in no event later than forty-eight hours after the special activity has been authorized." This requirement could in some rare circumstances pose unacceptable risks to the conduct of a covert action. There could be cases where Presidential authorization might be required considerably in advance of the execution of the activity in order that adequate preparatory measures could be taken. Notification upon authorization could risk exposure of the project and put the lives of Americans or others assisting the country in jeopardy.

This clause is designed to close the "loophole" in current law which permitted the President to avoid notification of the Iranian arms shipments for many months. Concern over this particular event is understandable and warranted, but the excessively restrictive language proposed seems a case of throwing out the baby with the bath. It is not possible to eliminate every opportunity for abuse by the Executive without at the same time paralyzing the ability to act.

The rigid notification requirement apparently stems from the belief that if the Intelligence Committees had been notified of the Iranian arms proposals, the members would have reacted negatively and the President would on that account not have proceeded with his plans. There is no evidence to support this assumption. Indeed, as it was, the President was confronted, by his principal advisors, with views strongly in opposition to the Iranian arms sales.

Another operation having the unique characteristics of the Iranian arms for hostages affair is not likely. In the Iranian case, every senior U.S.official involved made serious mistakes. That, I think we can be confident, will remain a rare phenomenon. The cause of this particular foreign policy failure must be attributed to people, not process. In addition, and even more important, the Iranian affair is certain to be a graphic object lesson for future Administrations. The political costs to the President of the Iran/Contra affair have been severe. The President has been demonstrated

to be accountable, in the most real sense, for the actions of the Executive Branch and, very directly, for the NSC and its staff. If there is a political message in this unfortunate matter it is that the President, in his own interest, ought to seek consultation with appropriate elements of the Congress, especially where important policy issues are at stake. He simply cannot go it alone, not over the longer run on issues of significance.

Problems of governance, in our system of shared powers, cannot effectively be resolved by each branch pressing its extreme position. If the system is to avoid paralysis and to perform well in the interests of the American people, it can only be through a cooperative, not a confrontational, approach. While the Constitution may be an invitation to struggle over foreign policy, we do not have to accept that invitation. We can instead try comity.

There are great lessons in the Iran/Contra mess, beyond the political costs of trying to bypass the Congress. Many of them, for the Executive Branch, were set out in the Tower Board report. Additionally, it should be clear that covert action should be undertaken only in support of our foreign policies, not in contradiction to them. In the Iranian case, in particular, the exception to policy had the practical effect, albeit unintended, of undermining seriously the strongly supported public policy. We may also have to recognize, regretably, that in the present climate covert action should be undertaken only when there is broad consensus on the underlying policy it is designed to promote. That is unfortunate, because covert action can frequently be most useful when problems are incipient, when modest efforts can be more effective than the massive involvement which may subsequently be required if issues are allowed to fester until their implications become apparent to all and there is a consensus on action.

But while there are many lessons for the Executive--most if not all of which are recognized and being dealt with by the President--the Congress has responsibilities as well. Leaks, for example, which are at the heart of this issue, are a shared problem. It is even possible that the situation may be worse in the Executive Branch than on Capitol Hill. However, justified or not, a President understandably is reluctant to share fully the most secret of matters with people some of whom may have sharp policy differences with him and over whom he can

exercise no authority or discipline whatever. Congress must accept some responsibility for the satisfactory resolution of these matters. It should accept that it is an integral part of the process, not simply a judge and jury of the mistakes it perceives being made by the Executive Branch.

The Tower Board recommended against legislation to deal with the problems revealed in the Iran/Contra affair. I support that recommendation. In my opinion, H.R. 3822 is a step toward paralysis, not effective Government.